

THE NEXT PHASE: POSITIONING THE POST-*OBERGEFELL* LGBT RIGHTS MOVEMENT TO BRIDGE THE GAP BETWEEN FORMAL AND LIVED EQUALITY

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*If you don't know where you're going, any road will take you there.*¹

INTRODUCTION

What happens when a law reform movement finally achieves a set of major policy reform objectives? Critical Race Theorist Richard Delgado once wisely observed in the context of racial justice, that, for minority groups, “the mere announcement of a legal right means little. We live in the gap between law on the books and law in action.”²

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1. GEORGE HARRISON, *Any Road, on BRAINWASHED* (Dark Horse/EMI 2002).

2. Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What*

While this opinion may be at odds with dominant narratives in American society about the efficacy of law reform, it seems depressingly accurate in light of the current state of American racial justice. The mass incarceration of people of color and the unfathomable damage it inflicts,³ the disproportionate unemployment rates of African-Americans,⁴ and the continued de facto racial segregation in American schools⁵ all demonstrate with anguishing clarity that, while landmark policy reforms like *Brown v. Board of Education*,⁶ *Batson v. Kentucky*,⁷ or Title VII⁸ made a difference, they did not make a difference sufficient to truly render law as written an accurate mirror of the world as minorities live in it.

So we already know, whether we wish to admit it or not, that policy reform does not end the work of a movement. This principle may appear practically self-evident to those familiar with racial justice movements, but seems somehow less obvious when applied to the contemporary movement for lesbian, gay, bisexual, and transgender (LGBT) equality.

Since the mid-1990s, the LGBT rights movement has come to concentrate its efforts and allocate its resources largely in the areas of impact litigation campaigns and high-profile attempts at federal legislative and regulatory reform. These activities, which have largely supplanted grassroots organizing run by local community leaders as the dominant strategies of the movement, have shared an animating goal—the eradication of formal inequality for LGBT people within the sphere of domestic law.

The goal of eliminating formal inequality has proved an enduring one, largely because there has historically been so much formal inequality to go around. In 1995, a little over two decades ago, the world of American law was one in which inferior treatment of LGBT citizens was, simply put, everywhere. It was perfectly acceptable in 1995 to prosecute same-sex couples for having sex,⁹ to dishonorably discharge members of the military for admitting to being

Minorities Want?, 22 HARV. C.R.-C.L. L. REV. 301, 304 (1987).

3. See generally Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, ATLANTIC MONTHLY (Oct. 2015), <https://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246>.

4. See generally *Labor Force Statistics from the Current Population Survey*, U.S. BUREAU OF LABOR STATISTICS, http://www.bls.gov/web/empst/cpsee_e16.htm (last visited June 10, 2017).

5. See generally Jason M. Breslow et al., *The Return of School Segregation in Eight Charts*, FRONTLINE (July 15, 2014), <http://www.pbs.org/wgbh/frontline/article/the-return-of-school-segregation-in-eight-charts>.

6. 347 U.S. 483 (1954).

7. 476 U.S. 79 (1986).

8. 42 U.S.C. § 2000e.

9. See generally *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

part of the LGBT community,¹⁰ to statutorily forbid gay people from adopting in the state of Florida,¹¹ to use LGBT status as a strike against a parent seeking custody in Pennsylvania,¹² to fire transgender workers under Title VII,¹³ and for every jurisdiction in the United States to forbid the issuance of marriage licenses to same-sex couples.¹⁴ Given what the LGBT community faced, the martialing of comparatively enormous resources toward the goal of eradicating these facial symbols of inequality was surely a sensible, and even an obvious goal.

Two short decades later, however, the landscape has shifted dramatically. It is true that we face a presidential administration that has already proved itself hostile to individual rights generally and LGBT rights specifically.¹⁵ The fact remains, however, that evidence of progress is overwhelming, and much of that progress is impervious to the machinations of the current regime. Lesbian, gay, and bisexual soldiers may serve openly in the military,¹⁶ transgender litigants have won impressive expansion of Title VII coverage,¹⁷ and same-sex-headed

10. See 10 U.S.C. § 654, *repealed by* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3516 (2010).

11. See FLA. STAT. § 63.042 (2003) (“No person eligible to adopt under this statute may adopt if that person is a homosexual.”), *repealed by* 2015 Fla. Laws ch. 2015-130. This statutory provision, while being upheld in 2004 as constitutional in *Lofton v. Sec’y of the Dep’t of Children and Family Servs.*, 358 F.3d 804 (11th Cir. 2004), was struck down as violative of Florida’s state constitution in *Fla. Dep’t of Children and Families v. Adoption of X.X.G.*, 45 So. 3d 79 (Fla. Dist. Ct. App. 2010).

12. See *Constant A. v. Paul C.A.*, 496 A.2d 1 (Pa. Super. Ct. 1985), *overruled by* *M.A.T. v. G.S.T.*, 989 A.2d 11 (Pa. Super. Ct. 2010).

13. See, e.g., *Enriquez v. W. Jersey Health Sys.*, 777 A.2d 365, 371 (N.J. Super. Ct. App. Div. 2001) (describing a “possible change in the federal approach to gender dysphoria” that would allow gender stereotyping claims on behalf of transgender employees, but affirming that “the federal courts construing Title VII have unanimously concluded that discrimination on the basis of gender dysphoria is not sex discrimination”).

14. See Jonathan Deitrich, Comment, *The Lessons of the Law: Same-Sex Marriage and Baehr v. Lewin*, 78 MARQ. L. REV. 121, 121 (1994) (“Currently [in 1994], no state recognizes same-sex marriages, despite the United States Supreme Court’s repeated assertion that marriage is a fundamental right.”).

15. See, e.g., Sabrina Siddiqui, ‘Death by a Thousand Cuts’: LGBT Rights Fading Under Trump, *Advocates Say*, GUARDIAN (March 30, 2017) (outlining the Trump administration’s decision to roll back a number of Obama-era executive-branch protections for LGBT people); German Lopez, *Trump Promised to Protect LGBTQ People. But He Hasn’t Even Recognized Pride Month*, VOX (June 7, 2017, 12:50 PM EDT), <https://www.vox.com/identities/2017/6/7/15753644/trump-june-pride-month>.

16. See *supra* note 10. The Department of Defense more recently lifted the ban on transgender personnel in the military, an executive branch action likely more susceptible to reversal than the congressional repeal of “Don’t Ask, Don’t Tell.” See Matthew Rosenberg, *Transgender People Will Be Allowed to Serve Openly in Military*, N.Y. TIMES (June 30, 2016), <https://www.nytimes.com/2016/07/01/us/transgender-military.html>.

17. See, e.g., *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (“[D]iscrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it’s described as being on the basis of sex or gender. Indeed, several circuits have so held.”).

households face far less overt differential treatment.¹⁸ And of course, in the dizzying space of only two years, the Supreme Court struck down the federal Defense of Marriage Act¹⁹ and declared that states may not prohibit same-sex couples from marrying.²⁰ All in all, things look very different now than they did only a short time ago.²¹

However, even recently, the LGBT rights movement—at least the one that exists outside legal scholarship—has not engaged in a systematic way with the many strands of thought that call into question the endgame of broad policy reform. The fundamental questions of what we really get when we get rights, and of what new kinds of work must therefore be taken up after we achieve long-sought policy reform goals, are still not being asked with enough rigor or frequency.

But as the LGBT rights movement continues forward and the destination of “having our rights” actually comes into view, the questions become more real, and the need to address them more urgent. Those aligned with the cause of LGBT equality must pause, observe the movement’s current resource allocation, think about what will happen when major policy reform initiatives are achieved, and think critically about where we might need to go next. This Article seeks to contribute to that conversation by considering some important limitations of policy reform and envisioning the structural changes that the movement might need to undergo to move past those limitations. In short, this Article seeks to imagine the next phase in LGBT-rights legal advocacy.²²

Part I of this Article begins by assessing the movement’s current structure: by engaging in a general survey of the budgets of some of the most prominent LGBT-rights organizations. This section will attempt to establish as a preliminary matter that the LGBT rights movement does in fact currently allocate resources in a manner that heavily skews toward strategies that are designed to produce formal equality gains through either legislative reform or

18. See *supra* notes 11 and 12.

19. *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013).

20. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604-05 (2015).

21. At the outset, it is vitally important to note that, however impressive the gains that have been made, this article does *not* make the claim that formal equality gains for LGBT people have been so widespread or transformative that we can say with a straight face that the formal equality project is somehow complete. This is clearly not the case. In myriad ways, LGBT people are still treated in law explicitly as second-class citizens. See, e.g., *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 290 (3d Cir. 2008) (holding that Title VII does not provide a remedy for discrimination against lesbian, gay, or bisexual employees unless the employee can show that gender stereotyping played a part in adverse employment action). *But see Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 351 (7th Cir. 2017) (en banc) (holding that “a person who alleges that she experienced employment discrimination on the basis of her sexual orientation has put forth a case of sex discrimination for Title VII purposes”).

22. My perspective on these issues is informed by my experience as the former legal director of a small LGBT-rights nonprofit that focused on the provision of direct legal services, public education, and policy reform on behalf of Pennsylvania’s LGBT population.

impact litigation. This section will also attempt to establish that funding for direct legal service programs—programs that provide routine, culturally and technically competent representation of persons of limited means—is dramatically less robust.²³

Part II briefly discusses *Obergefell v. Hodges*, which has finally brought about the kind of sweeping policy reform that the LGBT-rights infrastructure has been constructed to facilitate. This section considers how the opinion frames the right at issue, and discusses the movement’s response to the decision and the pronouncements that have been made about what comes next. This section also notes that the rhetoric of LGBT rights has quickly shifted from marriage to the passage of federal nondiscrimination legislation, another formal equality goal that has historically held a position of prominence within the movement.

Part III asks that we consider not only what the LGBT rights movement has accomplished, but also what it cannot accomplish—at least not through policy reform alone. This section will focus on two specific limitations of a movement built almost exclusively around the achievement of formal equality. In Part IIIA, this Article will question whether the current focus on impact litigation and policy reform can coherently address the question of enforcement; in short, can a machine that has been built to produce formal equality gains effectively ensure that those gains are actually made available in the lives of LGBT citizens? This section will provide some specific examples of circumstances in which impact litigation and legislative reform resulted in the ostensible achievement of “rights” for LGBT citizens, but the right achieved proved functionally unattainable, due either to bias within court administration or the judiciary, or to lack of technical expertise among available attorneys.

In Part IIIB, this Article will address the question of whether formal equality creates entirely new problems that clearly cannot be solved by the production of more formal equality. There has long been a concern, principally expressed among Critical Race Theorists, that formal equality gains can actually encourage a false belief that a previously unfair system is now fair, which can mask the reality of discrimination. This Article will note that recent scholarship on the behavior of fact-finders in employment discrimination seems to give further credence to this concern.

In light of these limitations, this Article will argue that a movement that relies almost solely upon impact litigation and legislative reform will quickly become ineffective in addressing next-phase issues, even if it achieves desired reforms.

Part IV of this Article thus suggests that LGBT-rights leaders seize this

23. Since this Article focuses on the issue of legal rights, this section does not examine the funding of non-legal organizations (such as social service agencies or healthcare organizations) unless those organizations have a legal department.

opportunity to strategically pivot to an infrastructure that allocates significant resources toward direct legal services, a platform that is much more suited to the more diffuse, smaller-scale, next-phase problems this Article raises.

I. CURRENT RESOURCE ALLOCATION

The LGBT rights movement as currently constituted allocates resources very generously toward achievement of litigation and legislative gains aimed at creating formal equality and around educational and communications campaigns designed to support that work. Very little, comparatively, is allocated towards groups that primarily focus upon the provision of legal services on an individual basis to members of that same community.

What follows is a brief review of some financial information about selected LGBT-rights groups which may help to illustrate that point. Note that not all LGBT-advocacy groups are included in this section, for two reasons. First, this section is meant to be illustrative, and is not intended to provide an empirically precise enumeration of the total money expended nationally on different types of programs. Second, it is simply extremely difficult to obtain useful financial data about certain groups. For example, the ACLU's Lesbian Gay Bisexual Transgender & AIDS Project is not included, despite being extremely successful and highly influential, because it is embedded within an enormous organization that does not provide easily accessible figures on the total expenses of that single project.

Lambda Legal, by far the largest LGBT-rights impact litigation group, engages in impact litigation, public education, and policy advocacy work.²⁴ Financial data from fiscal year 2014 reveals that Lambda Legal reported revenue of about \$15,000,000.²⁵ It reported expenses on its programming of about \$11,000,000.²⁶ Of that programming expense, about \$5,500,000 was spent on "LGBT and HIV law reform, policy, and education work," while the remaining \$6,000,000 million was spent on "communications and community education about legal issues affecting LGBT people and people with HIV."²⁷

GLBTQ Legal Advocates and Defenders (formerly GLAD—Gay and Lesbian Advocates and Defenders) is an LGBT legal advocacy organization that historically has limited its geographic scope to the New England area (but which has recently expanded that scope to include selected cases of national importance).²⁸ In its fiscal year 2014-2015, it reported total revenue of just over

24. See *About Us*, LAMBDA LEGAL, <http://www.lambdalegal.org/about-us> (last visited Apr. 21, 2017).

25. See *IRS Form 990*, LAMBDA LEGAL (2014), http://www.lambdalegal.org/sites/default/files/final_form_990_no_schedule_b_0.pdf.

26. See *id.* at 2.

27. See *id.*

28. See *Mission and Values*, GLBTQ LEGAL ADVOCATES & DEFS., <http://www.glad.org/about/mission> (last visited Apr. 21, 2017).

\$3,000,000.²⁹ About \$2,250,000 of its total expenses were directed toward three projects: 1) the Civil Rights Project, which focuses on “ending discrimination ... and on protecting LGBTQ families;” 2) Public Affairs and Education, which “provides information and education” about the rights of LGBTQ and HIV-affected people; and 3) the Transgender Rights Project, which uses “litigation, legislative and policy work, and advocacy to end discrimination” against the trans and gender variant community.³⁰

Despite its reputation as the more regionally focused of the major LGBT-rights impact litigation organizations, Civil Rights Project Director Mary Bonauto has acted as counsel on three of the most consequential same-sex marriage cases in American history³¹: *Baker v. State*,³² the Vermont case which led to the creation of civil unions; *Goodridge v. Department of Public Health*,³³ which resulted in Massachusetts becoming the first state to permit same-sex marriage; and *Obergefell v. Hodges*,³⁴ which recognized a nationally applicable right to same-sex marriage rooted in the Fourteenth Amendment.

The National Center for Lesbian Rights (NCLR) is a San-Francisco-based national LGBT-advocacy organization which emphasizes the litigation of precedent-setting cases, advocating for policy reform, and providing public education services.³⁵ In its 2014-2015 fiscal year, it reported revenue of just about \$5,000,000, over \$4,000,000 of which was spent on its programming.³⁶

The American Foundation for Equal Rights (AFER) is a relatively new organization that was initially launched in 2009 with the specific purpose of advocating for marriage equality.³⁷ In its 2012-2013 fiscal year, it reported revenue of a little over \$2,500,000 and program-related expenses of about \$1,500,000, for a combination of a public awareness campaign on marriage equality and very limited litigation for marriage equality.³⁸ Much of AFER’s

29. See *IRS Form 990*, GLBTQ LEGAL ADVOCATES & DEFS. (2015), <https://www.glad.org/wp-content/uploads/2016/10/glad-form-990-march-31-2016.pdf>.

30. See *id.* at sched. O.

31. See *Mary L. Bonauto*, GLBTQ LEGAL ADVOCATES & DEFS., <https://www.glad.org/staff/mary-bonauto/> (last visited Apr. 21, 2017).

32. 744 A.2d 864, 886 (Vt. 1999).

33. 798 N.E.2d 941, 969-70 (Mass. 2003).

34. 135 S. Ct. 2584, 2604-05 (2015); see also *supra* text accompanying note 20.

35. See *Mission & History*, NAT’L CTR. FOR LESBIAN RIGHTS, <http://www.nclrights.org/about-us/mission-history/> (last visited Apr. 21, 2017).

36. See *IRS Form 990*, NAT’L CTR. FOR LESBIAN RIGHTS (2014), <http://www.nclrights.org/wp-content/uploads/2015/06/2014-NCLR-990-Tax-Return-public.pdf>.

37. See *About Us*, AM. FOUND. FOR EQUAL RIGHTS, <http://www.afer.org/about/the-foundation> (last visited Apr. 21, 2017).

38. *IRS Form 990*, AM. FOUND. FOR EQUAL RIGHTS (2012), <http://www.afer.org/wp-content/uploads/2014/05/AFER-3-31-13-PUB-DISCLOSURE-990-SCHEDULES.pdf>.

AFER was the main sponsor of *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), which upheld a district court decision striking down California’s anti-same-sex-marriage Proposition 8 on the grounds that appellants lacked standing to appeal to the Ninth Circuit.

work has focused on the production of plays, documentaries, and public education campaigns designed to make the case for same-sex marriage equality.³⁹

The Human Rights Campaign (HRC) is the largest LGBT-advocacy organization that does not engage in impact litigation. Instead, HRC is a membership-based organization that focuses largely on legislative and other policy reform.⁴⁰ In its 2014-2015 fiscal year, it reported total revenue of about \$37,000,000, and spent about \$25,600,000 on three major projects: 1) “Federal, Field, and Legal Advocacy” (which focuses on law reform); 2) “Membership Education and Mobilization” (which leverages its membership-based platform to encourage its more than 1,500,000 members to press for law reform); and 3) “Public Policy, Education & Training,” (which attempts to gain support for the LGBT community through media).⁴¹

The National LGBTQ Task Force (Task Force), like HRC, engages in legislative advocacy and other nonlitigation activities designed to empower and liberate the LGBT community.⁴² In its 2013-2014 fiscal year, the Task Force reported almost \$6,000,000 in total revenue, and spent about \$6,500,000 on a combination of policy reform efforts, hosting a national conference, and various training and educational efforts.⁴³

To be sure, these figures do not demonstrate by any means that each penny directed toward these organizations’ program costs go directly toward legislative drafting and lobbying, or toward litigation support specifically. As demonstrated, each agency spends money on those things, but also on education for elected officials, the public, legislators, and the judiciary, the provision of legal information and attorney referrals, and other tasks.

However, all of these agencies share a common feature: they do not

AFER also assisted in litigating *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), a Virginia same-sex marriage case that resulted in a Fourth Circuit decision striking down Virginia’s same-sex marriage ban on Fourteenth Amendment grounds. The organization is best known as being the sponsor of David Boies and Theodore Olson’s work on these cases. See Robert Barnes, *Lawyers Olson and Boies Want Virginia as Same-sex Marriage Test Case*, WASH. POST (Sept. 30, 2013), https://www.washingtonpost.com/politics/lawyers-olson-and-boies-want-virginia-as-same-sex-marriage-test-case/2013/09/29/5309af60-282c-11e3-9256-41f018d21b49_story.html?utm_term=.38f5bd3ca861.

39. See, e.g., “8”: *A Play About Marriage Equality*, AM. FOUND. FOR EQUAL RIGHTS, <http://afer.org/our-work/work8theplay/> (last visited Apr. 21, 2017).

40. *About Us*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/the-hrc-story/about-us> (last visited Apr. 21, 2017).

41. *IRS Form 990*, HUMAN RIGHTS CAMPAIGN (2014), <http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/images/campaign/HRC-990-2014.pdf>.

42. See generally *Highlights: Strategic Plan 2014-2017*, NAT’L LGBTQ TASK FORCE, http://www.thetaskforce.org/static_html/downloads/about_us/tf_strategic_plan2.pdf (last visited Apr. 21, 2017).

43. See *IRS Form 990*, NAT’L LGBTQ TASK FORCE (2013), http://www.thetaskforce.org/static_html/downloads/devo/fy14_tf_e3_public_990.pdf.

provide direct legal services. Some engage in client representation, while others (like HRC and the Task Force) do not. However, even those organizations that do represent individual clients do so in order to secure policy reform goals.⁴⁴

There are, however, organizations that provide precisely this kind of service. Those organizations vary in nature. Some are projects of larger legal aid groups. Others are departments of comprehensive LGBT health and wellness nonprofits. Still others are small, standalone agencies. Their structure and geographic location may vary, but these direct service organizations all share two critical characteristics: 1) they are all committed to providing legal assistance to LGBT people on an individual basis, not based solely on the impact potential of the prospective client's case, and 2) they are all dramatically less well-funded than their policy-reform counterparts.

The contrast is striking when one compares the budgets of the above advocacy organizations with those of projects and agencies that provide direct legal services for LGBT people in the United States. The Sylvia Rivera Law Project (SRLP), which engages in advocacy and direct legal services for low-income gender-nonconforming individuals in the New York City area, reported expenses of about \$600,000 in 2012.⁴⁵ Free State Justice, which provides free direct legal services to Maryland's LGBT population, reported income of about \$230,000, and spent \$115,000 on its programs in its 2013 fiscal year.⁴⁶ Mazzoni Center Legal Services is located within a larger LGBT health and wellness organization located in Philadelphia; the legal department is the only program in Pennsylvania designed to provide no- or low-cost legal services to the LGBT population of that state.⁴⁷ Mazzoni Legal Services' fiscal year 2016 budget accounts for about \$260,000 in total expenses, inclusive of salaries and overhead.⁴⁸

The disparity in budgeting demonstrates that the resources of the LGBT movement are currently being allocated far more heavily toward law reform efforts than toward direct services. It is apparent that the machine of LGBT rights is tuned to produce the achievement of formal equality, both through impact litigation and legislative action. The question, then, is not whether the movement is geared more toward generating formal equality gains than toward direct representation of clients. Rather, it is whether the mechanisms that have so efficiently produced those gains in the last decade and a half are well-

44. See *supra* notes 24, 28, 35, 37, 40, 42 and accompanying text (explaining various organizations' missions and strategies).

45. See *2011-2012 Annual Report*, SYLVIA RIVERA LAW PROJECT, <http://srlp.org/wp-content/uploads/2013/04/SRLP-Annual-Report-2012.pdf> (last visited Apr. 21, 2017).

46. See *2013 Annual Report*, FREE STATE LEGAL PROJECT, https://freestate-justice.org/wp-content/uploads/2013/12/AR_FY13_spreads.pdf (last visited Apr. 21, 2017).

47. See *Legal Services*, MAZZONI CTR., <https://www.mazzonicenter.org/legal-services> (last visited Apr. 21, 2017).

48. See E-mail from Thomas Ude Jr., Legal & Pub. Policy Dir., Mazzoni Ctr., to author (Mar. 11, 2016, 11:09 EST) (on file with author).

positioned to deal with what comes after.

II. THE CURRENT LANDSCAPE: LGBT ADVOCACY AT THE CROSSROADS

As I have discussed in a prior article, the LGBT rights movement has in recent years become dominated by the goal of marriage equality. Other goals that were once paramount, such as the achievement of federal protection for LGBT workers, have receded into the background over the last two decades as marriage has moved to the forefront of both the litigation docket and LGBT-focused discourse.⁴⁹

Starting with *Baker v. State*⁵⁰ in 1999, when Vermont first required that same-sex couples be granted the same rights as married couples (if not the title), marriage litigation largely proceeded along a carefully scripted, incremental track. Litigation was brought only in state courts (to avoid bad national precedent), and only in states that seemed less risky. The understanding was that litigators were to avoid filing federal challenges, either to the federal Defense of Marriage Act (DOMA) or a direct federal constitutional challenge to states' withholding marriage rights from LGBT citizens. And to a great degree, LGBT-rights litigators managed to stem a tide of rogue litigators that might have derailed this project.

However, in November 2010, Edith Windsor, initially against the advice of at least one national LGBT-rights group,⁵¹ filed her federal challenge to DOMA, based on the federal government's refusal to recognize her New York marriage to her late spouse and its resulting determination that she owed over \$300,000 in estate tax.⁵² By June 2013, Section 3 of DOMA was held unconstitutional by the Supreme Court.⁵³

United States v. Windsor, although a real rebuke of the Defense of Marriage Act, was a 5-4 decision with an uncertain doctrinal framework⁵⁴ and

49. See Leonore F. Carpenter, *Getting Queer Priorities Straight: How Direct Legal Services Can Democratize Issue Prioritization in the LGBT Rights Movement*, 17 U. PA. J.L. & SOC. CHANGE 107, 130 (2014).

50. 744 A.2d 864, 886 (Vt. 1999). Some marriage litigation was actually brought much earlier than this case, but *Baker v. State* was the first in the more recent string of cases that resulted in equal benefits actually being made available to same-sex couples. See, e.g., *Baker v. Nelson*, 409 U.S. 810, 810 (1972) (challenging Minnesota's ban on same-sex marriage on constitutional grounds, but dismissed for lack of a substantial federal question); *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993) (holding that laws against same-sex marriage were subject to strict scrutiny under Hawaii's state constitution, but prevented from having an impact by a subsequent contrary state constitutional amendment).

51. Windsor's attorney, Roberta Kaplan, reports that Windsor first contacted Lambda Legal, which—in keeping with its national strategy—refused to take her case because it was the “wrong time for the movement.” See ROBERTA KAPLAN WITH LISA DICKEY, THEN COMES MARRIAGE 113 (2015).

52. See *United States v. Windsor*, 133 S. Ct. 2675, 2683 (2013).

53. *Id.* at 2696.

54. In particular, there exists no real consensus on the level of scrutiny applied. See

some very testy dissents, including one from the Chief Justice that read like a warning to litigators to move no further forward.⁵⁵ And yet, what followed *Windsor* was less a continuation of the orderly incrementalism of the last decade, and more a full-tilt foot race to see which litigation team in which state could file a direct federal challenge to a state marriage ban and get back to the Supreme Court the fastest.⁵⁶

Thus, the *Obergefell* decision represents the surprisingly rapid culmination of a vast litigation effort that has spanned dozens of state and federal courts over decades.⁵⁷ And its result represents an enormous victory, since it has announced that there is a right for same-sex couples to marry that stems from the Fourteenth Amendment, ensuring that no state may maintain a prohibition on same-sex marriage.⁵⁸ Of course, the opinion leaves some doctrinal uncertainty intact. In particular, Justice Kennedy's full-throated embrace of a liberty-based rationale and his less-than-robust treatment of equal protection still did not resolve the question of whether sexual orientation discrimination is entitled to heightened scrutiny.⁵⁹ But that's largely unimportant to most people. What *Obergefell* represents, both to lay people and movement lawyers, is the happy ending to a very long, very exhausting chapter in LGBT history—a chapter that has to a great degree shaped the way in which the movement is constructed, how its successes are measured, and indeed, how society thinks about LGBT people.

In the relatively short time since *Obergefell* was decided, the message of

Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817, 871-72 (2014) (“*United States v. Windsor* was (at least in part) an equal protection decision—about that, lower courts are in agreement. But when it comes to the formal doctrinal aspects of the holding, that is where the agreement ends. Some courts have concluded that the *Windsor* Court applied heightened scrutiny; others have found that it applied intermediate scrutiny. Still others have determined that the Court applied rational basis review—or perhaps the ‘more searching form of rational basis review’ known colloquially as rational basis with bite.”).

55. See *Windsor*, 133 S. Ct. at 2696 (Roberts, C.J., dissenting).

56. The Supreme Court's decision in *Windsor* was released on June 26, 2013. *Id.* at 2675. As an example of the rapidity of the litigation response, by July 19, 2013, the *Obergefell* plaintiffs had already filed their initial complaint in the United States District Court for the Southern District of Ohio. See *LGBT Rights on the Docket: Obergefell v. Hodges*, AM. CIVIL LIBERTIES UNION OF OHIO, <http://www.acluohio.org/cases/obergefell-v-hodges> (last visited Apr. 21, 2017).

57. For an overview of the astounding breadth of litigation decided and filed *only* in the two years between *Windsor* and *Obergefell*, see *Favorable Rulings in Marriage Equality Cases Since United States v. Windsor*, LAMBDA LEGAL (June 24, 2015), http://www.lambdalegal.org/sites/default/files/post-windsor_cases_ruling_in_favor_of_marriage_equality_claims_as_of_6.24.2015.pdf.

58. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607-08 (2015).

59. Between *Windsor* and *Obergefell*, the Ninth Circuit had determined that heightened scrutiny applied to sexual orientation discrimination in a case involving the use of a peremptory challenge of a juror based upon the juror's sexual orientation. See *Smithkline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014). *Obergefell* provided no further guidance on this issue.

movement leaders has, by both necessity and design, shifted. And it has become apparent that the new flagship goal is actually the old one—passage of LGBT-inclusive nondiscrimination laws. In a *New York Times* editorial that ran on the day *Obergefell* was decided, Evan Wolfson, head of advocacy group Freedom to Marry, and the man properly credited as a primary architect of the same-sex marriage movement, discussed the movement’s next priorities.⁶⁰ In unequivocal language, Wolfson asserted that after a period of celebration, “now we must get back to work. Securing protections from discrimination for gay, lesbian, bisexual and transgender Americans needs to be our priority.”⁶¹

And in fact, Freedom to Marry announced that it would be closing, and that a new group, Freedom for All Americans, would absorb some of its staff.⁶² Freedom for All Americans bills itself as a “bipartisan campaign to secure full nondiscrimination protections for LGBT people nationwide. Our work brings together Republicans and Democrats, businesses large and small, people of faith, and allies from all walks of life to make the case for comprehensive non-discrimination protections that ensure everyone is treated fairly and equally.”⁶³

Human Rights Campaign also asserted that it would not downsize. Instead, it would simply “pivot[] to other issues like non-discrimination laws and electing more LGBT-friendly candidates.”⁶⁴

One should not presume that LGBT advocates consider marriage to be a dead issue, based simply upon their choice to publicly refocus on antidiscrimination protection. Advocates understand that there is a nexus between the two issues, since currently, it is very possible in the majority of states for a person in a same-sex couple to be fired as a result of the compulsory visibility that marriage brings.⁶⁵ And impact groups have come to the aid of couples denied marriage licenses by holdout county clerks and judges who

60. Evan Wolfson, Opinion, *What’s Next in the Fight for Gay Equality*, N.Y. TIMES, (June 26, 2015), <http://www.nytimes.com/2015/06/27/opinion/evan-wolfson-whats-next-in-the-fight-for-gay-equality.html>. Wolfson’s long and pathbreaking career as a same-sex marriage advocate is detailed at *Evan Wolfson*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/the-team/entry/Evan-Wolfson> (last visited Apr. 21, 2017).

61. Wolfson, *supra* note 60.

62. See Tovia Smith, *After Supreme Court Decision, What’s Next for Gay Rights Groups?*, NPR (July 1, 2015), <http://www.npr.org/2015/07/01/418838989/after-supreme-court-decision-whats-next-for-gay-rights-groups>.

63. *About Freedom for All Americans*, FREEDOM FOR ALL AM., <http://www.freedomforallamericans.org/about> (last visited Apr. 21, 2017).

64. Smith, *supra* note 62.

65. See Naomi Shavin, *Gay Couples Can Marry Now, But They Can Still Be Fired for Being Gay*, NEW REPUBLIC (June 26, 2015), <https://newrepublic.com/article/122181/gay-couples-celebrating-today-could-be-fired-monday-being-gay> (quoting HRC’s deputy communications director as observing that “[m]aking progress in one area of our fight, like passing marriage equality, puts pressure to make sure LGBTQ people have nondiscrimination protection The interactivity of these issues leads to support for equality across the board”).

refuse to comply with the requirements of *Obergefell*.⁶⁶ But strategically, policy reform groups are well-served to do precisely what they are doing—declaring victory and moving on.

III. THE LIMITS OF LGBT-FOCUSED POLICY REFORM: BEYOND “RIGHTS TALK” TO ACCESS PROBLEMS AND UNACKNOWLEDGED DISCRIMINATION

As of this writing, the political climate is, to put it in the mildest way possible, in a state of flux. A new administration has taken root in the executive branch that seems both unmoored to traditional right-left social-issue ideology and prone toward extreme unpredictability, even chaos.⁶⁷ In addition, opponents of LGBT-rights progress have, in the wake of increasing acceptance of LGBT individuals and families, launched state-based campaigns to carve out extensive religious exemptions to antidiscrimination laws.⁶⁸ Opponents of transgender equality have similarly pushed at the state level for the passage of so-called “bathroom bills,” which restrict access to sex-segregated facilities such as restrooms based upon one’s sex as assigned at birth.⁶⁹ As the political landscape continues to shift in ways that we cannot now reliably predict, the LGBT rights movement’s current goals may have to be adjusted to account for this tumultuous reality.

Let us assume, however, for the sake of argument, that movement leaders remain steadfastly committed to the choice to pivot to the goal of achieving national uniformity in nondiscrimination protection for LGBT Americans. And let us assume further that their efforts result, in the next few years, in the passage of a new federal law that prohibits workplace discrimination based on sexual orientation or gender identity.⁷⁰ At that point, the LGBT rights movement will have achieved both of its marquee policy reform goals. So what ought to happen next? Should movement leaders continue upon the same strategic path using the same strategic tools, looking for new issues amenable to resolution through impact litigation or legislative reform? The following

66. See, e.g., *Miller v. Davis*, 123 F. Supp. 3d 924, 944 (E.D. Ky. 2015) (ruling in favor of the ACLU’s clients, plaintiffs who were denied a marriage license by Kim Davis, county clerk of Rowan County, Kentucky and infamous *Obergefell* refusenik).

67. See *supra* note 15 and accompanying text. Though unpredictable, the administration is seemingly committed to rolling back protections for LGBT people put in place under the Obama administration.

68. See generally Elizabeth Sepper, *Gays in the Moralized Marketplace*, 7 ALA. C.R. & C.L. L. REV. 129 (2015).

69. See “*Bathroom Bill*” *Legislative Tracking*, NAT’L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx> (last visited Apr. 21, 2017).

70. An increasingly likely alternative to legislation may be a Supreme Court decision that Title VII’s prohibition against sex-based discrimination in the workplace includes discrimination based on sexual orientation. In April 2017, the Seventh Circuit, sitting en banc, held exactly that. See *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 351-52 (7th Cir. 2017).

sections attempt to address that question by pointing to three issues that ought to give the movement pause before choosing to play the same game, using the same rules.

Sections III-A and III-B address remaining issues in areas where formal equality either already has or might soon be attained. These sections argue that: 1) the achievement of a “right” may prove ineffective in creating actual equal treatment for minority groups if there is no mechanism in place to vigorously enforce individual litigants’ access to that right; and 2) the achievement of formal equality may open a new forum for claims of unfair treatment, but within that forum, it might simultaneously create difficulty in proving individual instances of discrimination. I argue that these two issues, taken together, present a compelling case for a mindful reconsideration of current movement structure.

A. Achievement of Rights Does Not Ensure Access to Rights

What do we get when we get rights? Do we get something purely symbolic? Something with practical application? A Trojan horse than merely legitimizes a more broadly unfair system? These questions can be posed on both an abstract, theoretical level, and a practical, granular one. And if LGBT advocates consider this question, both in its macro and micro form, they may be troubled by its implications.

Broadly, we might question what “having your rights” actually means. Starting in the 1970s, Critical Legal Studies (CLS) adherents began to advance the argument that in fact, rights don’t actually mean a lot. CLS theorists have posited that “rights” are, to some degree, illusory. They have argued that rights are unstable (that they change depending upon the situation in which they are invoked), and that they are indeterminate.⁷¹ Some argued that the concept of “rights” is actually sometimes strategically deployed against liberty, by giving citizens just enough of a sense of equality and freedom to legitimize what is a fundamentally unfair and oppressive system.⁷²

Critical Race Theorists responded to this “critique of rights” by asserting that the concept of rights, while perhaps indeterminate and perhaps unstable, can only be seen as useless from the perspective of a nonminority with little skin in the game. Rights, according to Critical Race Theorists, in fact serve vitally important functions for oppressed minority groups by, to give one

71. See, e.g., Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1363-64 (1984).

72. See, e.g., David Kairys, *Freedom of Speech*, in THE POLITICS OF LAW 212 (David Kairys, ed., 3d ed. 1998) (asserting that contemporary models of “the right to freedom of speech” “serves in our society to validate and legitimize existing social and power relations and to mask the lack of real participation and democracy. After two hundred years, American democracy must mean more than voting in elections devoid of content or context and the right to picket when you’re really upset”).

example, providing a check on what would otherwise be entirely unfettered discrimination.⁷³

Thus, when we say, for example, that *Obergefell* has “given LGBT people our right to marriage,” it’s not entirely clear what we have been “given.” The tension in the competing theories on rights suggests that the LGBT community may have been handed a double-edged sword that legitimizes our relationships in the eyes of would-be oppressors while it simultaneously legitimizes the very system that gave rise to the oppression, and which has not been in any significant manner transformed by the inclusion of LGBT people in the institution of marriage.

Such an abstract discussion of the meaning of rights is interesting for scholars, but is unlikely to matter much to LGBT community members, particularly those who experience additional forms of oppression based upon poverty, race, disability, or other identities. For minorities, theoretical questions about rights must give way to much more immediate, survival-based considerations.⁷⁴ The question is whether the bundle of entitlements and responsibilities that accompany an announced right can actually be accessed.

Whatever we may think about rights, we know as a practical matter that announced rights do not self-enforce. The announcement of a right usually does not create an actual, tangible difference in the lives of individuals without some sort of interface with either public or private actors or institutions that gives life to the right. This observation is by no means new; it has been made in disparate contexts, by disparate scholars.⁷⁵

Certainly this is the case with the rights that have dominated the LGBT community’s attention and resources: the right to marry, and the right to be free of private discrimination. Both require an interface with government in order to access the right. Access to marriage rights first requires a trip to the county

73. See Delgado, *supra* note 2, at 305 (“Even if rights and rights-talk paralyze us and induce a false sense of security, as CLS scholars maintain, might they not have a comparable effect on public officials, such as the police? Rights do, at times, give pause to those who would otherwise oppress us; without the law’s sanction, these individuals would be more likely to express racist sentiments on the job. It is condescending and misguided to assume that the enervating effect of rights talk is experienced by the victims and not the perpetrators of racial mistreatment.”).

74. See *id.* at 307-08 (“A court order directing a housing authority to disburse funds for heating in subsidized housing may postpone the revolution, or it may not. In the meantime, the order keeps a number of poor families warm. This may mean more to them than it does to a comfortable academic working in a warm office. It smacks of paternalism to assert that the possibility of revolution later outweighs the certainty of heat now, unless there is evidence for that possibility.”).

75. See, e.g., Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 884-85 (2001) (arguing that a positive right to public assistance would likely be unhelpful because “the poor generally lack the ability to take advantage of a legal system of positive rights”); Samuel R. Bagenstos, *Mandatory Pro Bono and Private Attorneys General*, 101 NW. U. L. REV. 1459, 1460 (2007) (noting that civil rights laws cannot be accessed without filing Section 1983 suits).

clerk's office, and possibly, several trips later on: to divorce court, or through the probate process. Access to the right to be free from discrimination often requires the exhaustion of administrative remedies, and possibly a lengthy interaction with state or federal court. Thus, the announcement of these rights does not end the legal work; in a sense, it has just begun.

So what kind of work has to happen after a right is announced? The answer, as it turns out, is extraordinarily complex, and contingent upon numerous variables, including the client's factual circumstances, the personal characteristics of the client,⁷⁶ the origin of the right, the jurisdiction, the existence of resistance to the client's ability to access the right, and the source of that resistance.

Often, the announcement of a right creates a cascade of new, unanswered legal questions. The announcement of a broad-based legal right such as the right to marry then sometimes creates sub-questions, which must also be resolved, usually through an appellate litigation process that resembles the process that gave rise to the initial announcement of the broad-based right.⁷⁷

However, the announcement of a right also creates many new legal matters that, while they do not present novel issues of law, are of critical importance to the right-holder. In the antidiscrimination context, this legal work will occur before agencies like the U.S. Equal Employment Opportunity Commission (EEOC)⁷⁸ and before state and federal judges and juries as LGBT people litigate employment discrimination cases. In the marriage context, it will occur in family courts and before probate judges. Where obstinate judges, bureaucrats, or opposing counsel continue to resist treating LGBT citizens equally, the legal work will require an angry phone call, a well-placed letter to a presiding judge, or the filing of a mandamus action.

76. Significant characteristics include the client's race or ethnicity, their economic resources, disability, language and cultural barriers, past negative or positive interactions with the legal system, whether the client is out as LGBT, and the degree to which the client presents as gender variant.

77. See, e.g., *Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 335, 341 (Iowa 2013). In that case, Lambda Legal represented a lesbian couple who sought judicial review of a decision by the Iowa Department of Public Health (IDPH). IDPH had refused to apply the presumption of parentage when issuing a birth certificate for a child born to the couple while they were legally married. Lambda had litigated *Varnum v. Brien*, 763 N.W.2d 862, 906-07 (Iowa 2009), which held that Iowa could not withhold marriage benefits from same-sex couples without violating its state constitution. Thus, *Gartner* represents a situation in which a formal equality ruling creates cascading doctrinal uncertainty that must be clarified at the appellate level.

78. The EEOC has actually become increasingly willing to act on claims of anti-LGBT discrimination, and has recently issued two rulings holding that Title VII applies to both claims of anti-trans discrimination, see *Macy v. Holder*, No. 0120120821, 2012 WL 1435995, at *10 (EEOC Apr. 20, 2012), and anti-gay discrimination, see *Baldwin v. Foxx*, No. 0120133080, 2015 WL 4397641, at *5 (EEOC July 15, 2015). However, potential litigants must still convince individual EEOC investigators to treat these claims with equal gravity as other, more traditional sex discrimination cases.

I pause here to offer and analyze an anecdote that is intended to accomplish two aims: 1) illustrate the truth of the claim that rights do not self-enforce, and 2) present an example of the sort of legal work that I anticipate will soon become the “new normal” of the LGBT rights movement: the nuanced, complex, and largely thankless work of enforcing rights already announced.

On a spring day a few years ago, a lesbian named Diane⁷⁹ tried to file a custody complaint in a suburban Pennsylvania courthouse. Six months later, she was still trying.

Diane and her partner Kelly had moved to the state from California. Their life in California had gone well. They’d gotten together, and, as many same-sex couples do, they had entered into a domestic partnership registered with the state. Kelly gave birth to two beautiful children, whom she and Diane co-parented. Diane’s name was even on the younger child’s birth certificate.

Then the move to Pennsylvania came, and then the problems in the relationship that so often accompany stress, and then the breakup, and then the moving out, and then the fighting over custodial time that so often accompanies a breakup, and—without really knowing how it had gone so wrong so quickly—Diane found herself cut off from her children. Kelly wouldn’t let her see them. When she called, Kelly wouldn’t pick up. When she just showed up, Kelly wouldn’t let her in. The children were three years old and eight months old. They couldn’t make decisions for themselves.

Distraught, Diane did what anyone with even modest means would do. She called a lawyer who specialized in Pennsylvania family law, and hired him to file a custody complaint in a Pennsylvania trial court, asking the court to require Kelly to allow her to see her children.

This shouldn’t have been a difficult task, at least not at the filing stage. Although Pennsylvania does not enjoy a reputation as liberal or as LGBT-friendly as Diane’s home state of California, it happens to have a quite progressive body of case law regarding the custodial rights of people who co-parent children. In fact, Pennsylvania’s Supreme Court had decided as far back as 2001, in a highly publicized case litigated by numerous public interest organizations, that a same-sex partner unequivocally had standing to seek custody of children whom he or she had been co-parenting.⁸⁰ There might be a factual inquiry at trial as to the existence of a co-parenting relationship, and maybe she would have ended up with less custodial time than Kelly; but as long as the pleadings alleged that she had co-parented, the case ought to have been filed without difficulty and proceeded along the normal track.

But that’s not what happened. The attorney prepared the pleading, which alleged the co-parenting relationship, and sent it out in the mail to be filed. He later got it back in the mail; it had been rejected by a court administrator. Unsure why the pleading had been rejected, Diane’s attorney called the family

79. The names and some legally immaterial details in this story have been changed.

80. *T.B. v. L.R.M.*, 786 A.2d 913, 920 (Pa. 2001).

court, and was told that a family court administrator had determined that Diane had no standing to file the complaint. The administrator told the lawyer that she simply would not accept Diane's pleading, that she would not even take the pleading to a judge to review, and that there was nothing Diane could do about it.

Confused, the attorney took the administrator's word for it that his client lacked standing. After all, why would she lie? He thought he had read the law correctly, but this wasn't the type of case he normally dealt with, and he guessed that he'd just been wrong about the rights of lesbian co-parents. He broke the news to Diane, who was, as anyone would be, devastated.

After thinking about it, Diane decided that, even though she was just about out of money, she needed to try again. She found a new attorney, one who specialized in LGBT third-party custody in Pennsylvania. The new attorney filed a new pleading, the same type of custody complaint that she had filed innumerable times, in that suburban county and in probably a dozen other counties around Pennsylvania.

The pleading came back again, with the same explanation that Diane lacked standing. The attorney sent it back a week later, and included a detailed letter that explained the precise legal basis for standing. Diane and her new attorney waited to receive the scheduling paperwork that normally followed the successful filing of a custody complaint. They heard nothing, received nothing.

Diane's new attorney finally called the Family Court administrator, demanding an explanation. The administrator insisted that Diane could not file the custody complaint until she first filed something called a "Petition for Standing." The attorney knew that no such petition should be required, either under the state procedural rules of Pennsylvania or under the rules of that suburban county, but the administrator wouldn't listen. And again, she refused to take the matter before a judge. This, she insisted, was her decision to make, and she wouldn't budge.

Furious and bewildered, Diane's attorney fired off a letter to the presiding judge of the county.⁸¹ The letter read in part:

Plaintiff in this matter seeks custody of two (2) minor children. This Complaint was properly filed pursuant to 23 Pa.C.S. § 5324(2) based upon [name redacted]'s *in loco parentis* standing with respect to one child and her status as a legal parent to the other child. These facts, which confer standing in this matter, are alleged in the Complaint.

It is certainly not within the powers of a court administrator to act in a judicial capacity and then, *sua sponte*, make a determination that standing is an issue and refuse to process a Complaint. This is especially true where there is a clear statutory basis for standing that is set forth in the pleading itself.

The . . . Family Court Administration's treatment of this case is highly unusual. In my 15 years litigating *in loco parentis* and third party custody cases in Pennsylvania, I have never faced such obstruction at the Family Court

81. See Letter from Attorney to Presiding Judge (redacted copy on file with author).

Administration level.⁸²

The attorney Federal Expressed the letter and its attachments to the presiding judge. And something interesting happened. An hour after the letter was signed for by court staff, the attorney received a telephone call from the court administrator. Diane's custody complaint had been accepted.

However, by this point, Diane had not seen her children for six months.

I ask the reader to consider this anecdote in light of the question of rights enforcement. The announced right had been in effect for over a decade and ought to have been unequivocally available. The litigant was represented by counsel. And yet, the litigant was unable to access that right until an unacceptable amount of time had passed. Why? I offer two reasons.

First, the litigant in this case encountered a reality that, while not often discussed in legal literature, is a frequent subject of lamentation by members of the practicing bar: the fact that nonjudicial staff often perform critical gatekeeping functions that are virtually unregulated, and that take place outside the courtroom and off the record.⁸³ Where court administrators and other bureaucrats are hostile to LGBT people, or do not comprehend their legal position, that gatekeeping function can actually act as a practically impermeable barrier to access to the announced right. Given the spate of court clerks refusing to issue same-sex marriage licenses, or even resigning rather than having to comply with the requirements of *Obergefell*,⁸⁴ the issue of rogue court administrators refusing to allow LGBT people to access their rights is, if anything, more pressing than ever.

Second, as this litigant discovered, the reality is that even when LGBT people can allegedly access a right on the same footing as non-LGBT people, their cases may not look precisely like those of their straight, cisgender counterparts, and so attorneys with particular expertise in LGBT law remain critically important even after a right is announced.

In the marriage and family law context, there exist several relevant differences. For example, the inability for same-sex couples to form families without adoption or the use of assisted reproductive technology means that parentage issues may not be as easily resolved as with opposite-sex couples. Additionally, the fact that same-sex couples can marry now does not somehow

82. *Id.*

83. This reality also represents a source of continued distress for those with expertise in the appropriate functioning of court administrative offices. *See, e.g.*, Edward C. Sweeney, *Essential Practice Rules and Concepts in Offices of the Prothonotary—Part II*, 75 PA. B.A. Q. 169, 178 (2004) (“Ideally, in this author’s view, an office of the Prothonotary should not reject a filing unless a statute or rule requires him to do so. This view flows from the central operating principle under which the office of the Prothonotary operates. The office of the Prothonotary is a ministerial office which has no discretion in making judgments.”).

84. *See* Elliott C. McLaughlin, *Despite Same-Sex Marriage Ruling, Spasms of Resistance Persist*, CNN (June 30, 2015, 10:06 PM), <http://www.cnn.com/2015/06/30/us/same-sex-marriage-supreme-court-ruling-holdouts>.

mean that today's married same-sex couples haven't lived the vast majority of their lives under a scheme in which marriage was unattainable. This means that any legal proceeding that involves a backward look at the length of a relationship, even in the course of what may superficially seem like a run-of-the-mill divorce, may become hideously complicated.⁸⁵

It is well worth noting that, however anguishing Diane's situation was, it was not as bad as it might otherwise have been, for a few reasons. First, she had money. She was able to afford to hire an attorney who could help her, despite having already spent several thousands of dollars on an attorney who could not. Second, Pennsylvania, although certainly not the most LGBT-friendly location in the country, is also not the most hostile, and Diane had resources that she could access. She had access to nonprofits who could provide LGBT-friendly attorney referrals, a relatively large pool of culturally competent attorneys from which to choose, and ultimately, a presiding judge whose interest in the fair administration of justice led him to correct the situation.

As rights enforcement becomes, by necessity, a more critical component of the movement, we ought to think about Diane's situation. As awful as it was, is her situation indicative of what LGBT people are likely to face? Let us consider this. In Diane's story, I have pointed to two components—socioeconomic status and geography—that served as harm-mitigating factors.⁸⁶ While she had to experience six harrowing months cut off from her children, her harm was limited in that she was eventually reunited with them.

For innumerable members of the LGBT community at large, however, the rights-enforcement landscape will look bleaker than it did for Diane, in part because the questions of money and geography will make rights enforcement more difficult for many people, as opposed to less.

First, the question of socioeconomic status. Although myths persist regarding the affluence of same-sex couples,⁸⁷ demographic data suggests that, at least with respect to LGBT couples, queer folks are actually slightly poorer than their straight counterparts. According to a 2013 study by the Williams Institute, “[d]ata on couples suggests that same-sex couples are more

85. For a taste of exactly how confusing this can get, see generally Eric J. Shinabarger, *Back to the Future: How Illinois' Legalization of Same-Sex Relationships Retroactively Affects Marital Property Rights*, 90 CHI.-KENT L. REV. 335 (2015) (discussing the difficulty of retroactive application of same-sex marriage statutes in the realm of marital property).

86. There exist many other harm-mitigating factors that, in the interests of simplicity, I will not delve into here (such as Diane's uncomplicated immigration status, the existence in her life of support structures beyond those supplied by her partner, and the apparent lack of domestic violence within the relationship).

87. Thanks, Scalia. See, e.g., *Romer v. Evans*, 517 U.S. 620, 645-46 (1996) (Scalia, J., dissenting) (“[B]ecause those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities . . . have high disposable income . . . and, of course, care about homosexual-rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and statewide.”).

vulnerable to poverty in general than are different-sex married couples.”⁸⁸ Legal Services NYC, a legal service provider to low-income New Yorkers, recently completed a legal needs assessment of low-income LGBT New Yorkers, and found that the confluence of poverty and LGBT status results in significant legal vulnerability for that population.⁸⁹ The report asserts that:

Like others living without means, low-income LGBT people are desperate to access affordable housing, secure needed benefits and services, and protect their safety, employment, families, and legal status. But all too often, low-income LGBT clients are in a worse position than others: subject to anti-LGBT violence and harassment; discriminated against by government agencies, employers, and landlords; and left in limbo by a legal system that has been slow to protect LGBT people, relationships, and families.⁹⁰

The implications for LGBT rights enforcement are significant. In *The Relational Contingency of Rights*, Gideon Parchomovsky and Alex Stein have made a great contribution to the way in which we think about enforcement of rights, by linking traditional rights literature to Law and Economics scholarship.⁹¹ Their work demonstrates that the cost of vindicating a right—even one that generally requires no government interference to exercise (such as building a house or using copyrighted work)—can keep litigants from choosing to defend rights they theoretically hold. By looking at rights through the lens of litigation costs, Parchomovsky and Stein bring the discourse on rights past the announcement of the right itself, where the scholarly inquiry usually ends. “For us,” the authors assert, “the act of formal recognition is a mere starting point. In fact, we show that formal legal recognition often falls short of affording meaningful protection to entitlement holders.”⁹² The authors then go on to show how asymmetry in litigation costs can influence rights-holders to decide not to attempt to vigorously enforce their rights, even when the right itself is both clearly announced, and clearly applicable to the litigant.⁹³

With Parchomovsky and Stein’s theory of the economics of rights enforcement in mind, we may consider how poor LGBT people would calculate the acceptable cost of rights enforcement. Without access to a significant contingent of free or low-cost legal services, poor LGBT people may very well calculate that it is in fact too expensive to make any significant investment,

88. M.V. LEE BADGETT ET AL., WILLIAMS INST., *NEW PATTERNS OF POVERTY IN THE LESBIAN, GAY, AND BISEXUAL COMMUNITY* 1 (June 2013), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGB-Poverty-Update-Jun-2013.pdf>.

89. See LEGAL SERVS. NYC, *POVERTY IS AN LGBT ISSUE: AN ASSESSMENT OF THE LEGAL NEEDS OF LOW-INCOME LGBT PEOPLE* 1 (Jan. 19, 2016), <http://www.legalservicesnyc.org/storage/PDFs/lgbt%20report.pdf>.

90. *Id.* at 11.

91. Gideon Parchomovsky & Alex Stein, *The Relational Contingency of Rights*, 98 VA. L. REV. 1313, 1318-19 (2012).

92. *Id.* at 1317.

93. *Id.* at 1319-20.

much less the multi-thousand-dollar investment made by Diane, into the enforcement of ostensibly available rights.⁹⁴

The second factor that contributed to Diane's ultimately favorable outcome was geography. We may question where, in the context of rights enforcement, most LGBT people would find themselves. In other words, do LGBT folks live only in places like the suburbs of Philadelphia, with relatively favorable family law, relatively sympathetic judges, and relatively easy access to lawyers?

In the groundbreaking *Urban Bias, Sexual Minorities, and the Courts*, Luke Boso offers some insight, as he examines the reality of rural LGBT existence in light of persistent stereotypes about the lack of LGBT people in rural America and their fundamental unsuitability for those environments.⁹⁵ Boso observes that the archetypical narrative of LGBT life in America is shot through with presumptions about LGBT migration from rural areas to cities, which are considered to be the only suitable spaces for LGBT people to live—their natural habitat, so to speak.⁹⁶ The consequences of this narrative, according to Boso, are significant for the ways in which both opponents and supporters of LGBT rights think and talk about the issue:

The metronormative narrative fixing sexual minorities into presumably welcoming urban gay neighborhoods is omnipresent Gay rights advocates eager to herald social progress and change can look to increasing gay visibility and acceptance in metropolitan areas; it is easy to forget that there is a much greater nonmetropolitan world in which sexual minorities exist largely untouched by gay liberation Meanwhile, the person uncomfortable with homosexuality in his or her small town can justify discrimination by accepting as true the conventional wisdom that homosexuality is incompatible with small-town life and by presuming that sexual minorities can simply exile themselves to the city where they truly belong.⁹⁷

However, as Boso notes, the LGBT metropolitan migration narrative is misleading. Demographic evidence suggests that in fact, there are plenty of LGBT people living in rural areas of the country.⁹⁸ Furthermore, Boso observes

94. Working poor LGBT people may face the additional economic burden of highly inflexible work schedules, necessitating a would-be litigant's survival-based choice not to enforce rights because he or she simply cannot take time off work to get to court.

95. Luke A. Boso, *Urban Bias, Rural Sexual Minorities, and the Courts*, 60 UCLA L. REV. 562, 562 (2013).

96. *Id.* at 576-77.

97. *Id.* at 584. Boso's observation is directly reflected in Scalia's dissent in *Romer v. Evans*, 517 U.S. 620, 636 (Scalia, J., dissenting).

98. For example, the UCLA's Williams Institute released a report on "the demographic, economic, and geographic characteristics of same-sex couples" in five relatively rural states—Arkansas, Missouri, Nebraska, North Dakota, and South Dakota. Based solely on data gathered from the 2013 US American Community Survey, the report estimated that there were, as of 2013, an "estimated 19,652 same-sex couples" in those states alone. GARY J. GATES, WILLIAMS INST., DEMOGRAPHICS OF SAME-SEX COUPLES IN ARKANSAS, MISSOURI, NEBRASKA, NORTH DAKOTA AND SOUTH DAKOTA: ANALYSES OF THE 2013 AMERICAN COMMUNITY SURVEY 3 (Mar. 2015),

that rurality is both culturally and legally significant for LGBT people. He asserts that rural LGBT people are a population vulnerable to disparate treatment by local officials, noting that, as I have noted above, “[e]ven in states that have legalized same-sex marriage, some local officials ‘defy their state, refusing to sign marriage certificates of same-sex couples.’”⁹⁹ Boso highlights three family law cases from Missouri, Kentucky, and Idaho, in which trial court judges explicitly noted local social disapproval of homosexuality when ruling against LGBT parents in custody disputes,¹⁰⁰ as “explicit representation[s] of how rurality heightens sexual minorities’ legal vulnerability as parents.”¹⁰¹

So if rural LGBT people exist in significant numbers, are no wealthier (and possibly a bit poorer) than people who identify as straight and cisgender, and are likely to encounter resistance when attempting to enforce their rights, who will help them? As it turns out, they may not have a lot of options. Recent research has exposed the reality that rural residents, regardless of sexual orientation, gender identity, or income have dramatically less access to legal assistance than their urban or suburban counterparts.¹⁰² While there is a glut of lawyers in cities, rural areas have experienced a shortage so dramatic that South Dakota has begun offering subsidies to attorneys who agree to work in rural counties.¹⁰³ Of course, this problem is significantly compounded for rural people of limited means, who may not be able to afford the few attorneys who work in their area. Those residents may also face a very limited infrastructure for accessing free civil legal aid, as civil legal aid availability varies significantly between states, and even between counties within a given state.¹⁰⁴

<http://williamsinstitute.law.ucla.edu/wp-content/uploads/Demographics-AR-MO-NE-ND-SD-ACS2013-March-2015.pdf>.

99. Boso, *supra* note 95, at 584 (quoting Yishai Blank & Issi Rosen-Zvi, *The Geography of Sexuality*, 90 N.C. L. REV. 955, 976 (2012)).

100. *Id.* at 612 (citing *S.E.G. v. R.A.G.*, 735 S.W.2d 164, 166 (Mo. Ct. App. 1987) (“Union, Missouri is a small, conservative community with a population of about 5,500. Homosexuality is not openly accepted or widespread. We wish to protect the children from peer pressure, teasing, and possible ostracizing they may encounter as a result of the ‘alternative life style’ their mother has chosen.”); then citing *Maxwell v. Maxwell*, 382 S.W.3d 892, 899 (Ky. Ct. App. 2012) (“The only issue specifically mentioned by the family court, which was related to future harm to the children, is that the children might be teased about their mother’s same-sex relationship and that it might cause difficulty with the parents’ communication.”); and then citing *McGriff v. McGriff*, 99 P.3d 111, 117 (Idaho 2004) (“In his decision, the magistrate found that Theron’s choice of lifestyle should not be minimized in light of the conservative culture and values of the community in which the parties and the children reside.”)).

101. *Id.*

102. See Lisa R. Pruitt & Bradley E. Showman, *Law Stretched Thin: Access to Justice in Rural America*, 59 S.D. L. REV. 466, 468-69 (2014).

103. Under the law, the attorney agrees to practice in an eligible rural county for at least five years in exchange for a subsidy. See S.D. CODIFIED LAWS § 16-23-4 (2015).

104. According to a 2011 American Bar Foundation report, “[d]iversity and fragmentation combine to create an access to civil justice infrastructure characterized by large inequalities both between states and within them. In this context, geography is destiny:

So let us now return to the larger question of rights enforcement. Where does all of this talk of money and geography leave LGBT people wishing to access rights that they ostensibly have? It may be safe to say that well-heeled urban LGBT people will generally be alright. They might encounter some resistance when seeking to enforce their rights, but that resistance will likely be isolated to a single actor or at least localized to a single office; Diane's situation with the court administrator represents this kind of resistance. And when resistance does occur, more affluent urban-dwellers will have access to a deep bench of expert lawyers who will, like Diane's second lawyer, aggressively fight back and ensure that the client's rights are enforced. Those lawyers will likely be connected to LGBT movement lawyers, so the current LGBT rights movement structure might serve them well.

However, let us imagine a Diane slightly different than the one who didn't see her children for six months. This hypothetical Diane lives in rural South Dakota. She works, but her income is low, putting her right on the edge of qualification for free legal services. How would things have been different for Hypothetical Diane than Actual Diane? First of all, low-income, South Dakota Diane might not have been able to find a second lawyer to look at her case at all, much less one with a particular specialization in third-party custody. Second, if she was miraculously able to conjure an expert in third-party custody in a land virtually devoid of lawyers, how might she have afforded him or her?

Let us consider for a moment how easily the current LGBT rights movement structure could operate to intervene on behalf of a low-income, rural LGBT person wishing to enforce existing legal rights. The national organizations whose primary missions are legislative reform and public education (i.e. Human Rights Campaign) could do little. Their focus results in organizational structure that is simply ill-suited to assisting a single individual with a legal problem. Might they team up with a local organization¹⁰⁵ to attempt to leverage social media to drum up outrage, organize a boycott, lobby for policy reform?¹⁰⁶ Possibly, but this kind of advocacy is far more time-

the services available to people from eligible populations who face civil justice problems are determined not by what their problems are or the kinds of services they may need or be able to use, but rather by where they happen to live." REBECCA L. SANDEFUR & AARON C. SMYTH, AM. BAR FOUND., ACCESS ACROSS AMERICA: FIRST REPORT OF THE CIVIL JUSTICE INFRASTRUCTURE MAPPING PROJECT 9 (Oct. 7, 2011), http://www.americanbarfoundation.org/uploads/cms/documents/access_across_america_first_report_of_the_civil_justice_infrastructure_mapping_project.pdf.

105. There do exist a few local resources for LGBT South Dakotans, but none that provide legal services. For example, there is an LGBT center in Sioux Falls that appears to engage in some advocacy work, but which does not have any sort of direct legal service component. See *About*, CTR. FOR EQUAL., <http://thecenterforequality.org/about> (last visited June 10, 2017).

106. Those tactics have proven track records of success when applied to issues like the defeat of pending anti-LGBT legislation. For example, LGBT South Dakotans, in concert with national groups, recently successfully pressured their governor to veto a bill that would have required all students to use a restroom that corresponded to their birth sex, irrespective

intensive and likely less effective than a well-aimed lawyer letter to a presiding judge. For low-income, rural Diane this lack of timely and effective services would be devastating. While advocacy organizations did their best with the tactics they are designed to employ, her clock would tick away. Her children, denied access to her, would become strangers.

Existing LGBT impact litigation organizations might be able to intervene. If South Dakota Diane knows to contact them, they could conceivably assist—if they can quickly obtain pro hac admission to South Dakota or find local counsel quickly (although if Diane can't find local counsel, one wonders if an organization headquartered in San Francisco, or an organization whose closest satellite office is in Chicago, could do a lot better). But are impact organizations a good fit for the kind of granular, trial-level work that rights enforcement often requires? I suggest not.

Returning to our hypothetical South Dakota version of Diane, let us assume that, missing her children and lacking access to either funds or local legal talent, she attempts to contact Lambda Legal. Going to Lambda Legal's website, she will encounter the following message:

Lambda Legal selects cases that will have the greatest impact in protecting and advancing the rights of LGBT people and those with HIV. While we are not able to take every case, the Help Desk can discuss your legal issue with you, and can provide useful information. This assistance may include follow-up discussions with Lambda Legal attorneys or contact information for an attorney in your area or for other organizations that may directly assist you.¹⁰⁷

If Diane turns to the National Center for Lesbian Rights' website for assistance, she will learn this:

NCLR provides this Legal Information Helpline as a service to all members of the LGBT community and our allies. The Legal Information Helpline provides basic information about laws that affect LGBT people, including family law, and about resources available for people who are facing discrimination or other civil rights issues. The Legal Information Helpline is not a client intake line. We do not provide any legal advice, legal representation or take on cases through the Legal Information Helpline.¹⁰⁸

If Diane attempts to seek help from the ACLU of South Dakota, she will be asked to fill out a form on the ACLU's website documenting the discrimination she faces, below which she will find a lengthy disclaimer that includes the following message:

of their current gender identity or expression. *See, e.g.,* Nico Lang, Opinion, *Veto of South Dakota Transgender Bathroom Bill Shows Boycotts Work*, L.A. TIMES (Mar. 3, 2016, 12:44 PM), <http://www.latimes.com/opinion/la-ol-south-dakota-trans-bill-boycotts-work-lgbt-community-20160303-story.html>.

107. *Legal Help Desk*, LAMBDA LEGAL, <http://www.lambdalegal.org/help> (last visited Mar. 4, 2016).

108. *What NCLR's Legal Information Helpline Can and Cannot Do*, NAT'L CTR. FOR LESBIAN RIGHTS, <http://www.nclrights.dreamhosters.com/legal-help-resources/what-nclrs-legal-information-helpline-can-do> (last visited Mar. 4, 2016).

This Survey does not give legal advice, and you should not rely on it as legal advice. You should not rely on the information you get from this site and should speak with a lawyer to get advice on your specific situation. We also cannot promise that the information on this site is complete, accurate, or up-to-date.

This Survey is not a solicitation or an offer by the American Civil Liberties Union and its affiliates to represent you. We cannot promise you that the information you provide will lead to any specific action on the American Civil Liberties Union or its affiliates part. Once you complete the survey, the American Civil Liberties Union of South Dakota may not do anything—including contact you—about your situation.¹⁰⁹

None of these messages sound promising.¹¹⁰ And they're not meant to. Impact litigation organizations, by design, are highly selective in terms of cases they accept, taking only cases that are likely to affect the largest number of people, or are likely to effectuate some sort of broad-based policy reform. Those organizations have neither the capacity nor the desire to represent all who seek their services.

Would Lambda, NCLR, or the ACLU take Diane's case? The answer is unclear. If its staff believed that the specific problem faced by Diane was widespread, then it is possible that one of these impact groups would take this case. But what if these organizations believed that Diane's problem was unlikely to be repeated in its specific form? Or what if they believed that her legal problem was in some way tied to some unique facts in Diane's case? In that case, they would be unlikely to take on Diane as a client because her case lacked sufficient impact value, and would instead attempt to find her local counsel—a strategy that we know might prove fruitless, given the dearth of lawyers in South Dakota.¹¹¹

In sum, formal equality gains do not simply produce equality. They produce new work - much of it new work specifically for lawyers. Some of that work involves the kind of doctrinal clarification for which impact litigators are uniquely well-suited. But much, much more of the work of rights enforcement

109. *ACLU of South Dakota Legal Intake*, AM. CIVIL LIBERTIES UNION OF S.D., <https://action.aclu.org/secure/sd-legal-intake> (last visited Mar. 4, 2016).

110. I have not included GLBTQ Legal Advocates and Defenders (formerly GLAD) in this hypothetical, because that organization has historically, except in unusual cases, limited the scope of its representation to the New England area. *See generally GLAD Answers*, GLBTQ LEGAL ADVOCATES AND DEFS., <http://www.gladanswers.org/> (last visited Apr. 23, 2017).

111. South Dakota Diane might actually be better situated if she is truly in poverty, as in that case, she might qualify for legal services through Dakota Plains Legal Services, which prioritizes family law cases. *See DAKOTA PLAINS LEGAL SERVS.*, <http://www.dpls.org> (last visited Mar. 4, 2016). However, DPLS only serves thirty-three counties and several Native American Reservations, leaving thirty-three South Dakota counties without access to staffed legal aid. *See Areas Served*, DAKOTA PLAINS LEGAL SERVS., <http://www.dpls.org/areas-served> (last visited Mar. 5, 2017). There are sixty-six counties in South Dakota. *See U.S. CENSUS BUREAU, GOVERNMENTS—INDIVIDUAL STATE DESCRIPTIONS 364-68* (Oct. 2007), http://www2.census.gov/govs/cog/all_ind_st_descr.pdf.

is small-scale and granular; simple representation of clients in areas of law now open to them, or the prodding of individual actors (like court administrators and county clerks) to allow LGBT citizens to exercise rights that they now more clearly possess. For those LGBT citizens seeking help with that small-scale, next-phase work, they may find themselves without legal help. They may lack funds, they may reside in geographic areas where lawyers are scarce, expertise nonexistent, and bureaucrats hostile. Those LGBT people may be poorly served by our current LGBT rights movement structure. They will need something new—a next-phase movement.

B. Discrimination Becomes Prohibited, But Difficult to Prove

In addition to the coming wave of rights enforcement legal work, the LGBT rights movement may encounter a next-phase problem with which it is poorly equipped to deal. That problem involves anti-discrimination protections generally, and specifically, the tendency of fact-finders to treat discrimination cases with exceptional skepticism.

In *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, Katie Eyer explores, and attempts to explain, the phenomenally low success rate of employment discrimination litigants.¹¹² Eyer notes that employment discrimination plaintiffs lose, by every measure imaginable, at a far higher rate than any category of federal plaintiff except prisoners.¹¹³ After establishing that these plaintiffs' low rate of success is likely unattributable to factors such as settlement rates or the overall weakness of the plaintiffs' cases, Eyer looks to psychological studies to attempt to explain why, even in the face of what appears to be irrefutable evidence of discrimination, fact-finders tend to find so lopsidedly for the defense.¹¹⁴

Eyer notes that psychological literature demonstrates the existence of two theories that could account for this phenomenon:

- (1) that there is a tension between making attributions to discrimination and widely held American value systems, such as the belief that hard work gets you ahead in life; and
- (2) that due to cognitive factors, people's preexisting prototypes of discrimination (typically narrow disparate treatment) and their beliefs about the commonality of discrimination (typically rare) have a significant effect on the extent to which they make attributions to discrimination.¹¹⁵

The narrow reading of Eyer's work suggests that the widespread belief in meritocracy, and the public's resistance to setting aside that belief, can blind fact-finders (including judges) to obvious acts of discrimination, and thus blunt

112. Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1276 (2012).

113. *Id.*

114. *Id.* at 1277.

115. *Id.* at 1293.

the force of doctrinal reforms meant to address those acts. This alone ought to be sufficient to cause LGBT rights litigators and legislative reform activists to pause and question whether, for example, the passage of a federal LGBT-inclusive nondiscrimination law, or the passage of more state-level hate crimes legislation, will actually do as much to improve the lives of LGBT employees or victims of hate violence as they might hope.

But Eyer's hypothesis has far broader and more troubling implications for the entire enterprise of attaining formal equality gains. We know that Eyer's work demonstrates that Americans' attachment to the idea of our society as a meritocracy exerts a tremendous pull on their judgment, and causes them to disbelieve that prejudice is at work even where that prejudice appears objectively rather obvious. So—if the meritocratic belief is so strong, then what is the effect on that belief of doctrinal developments that are meant to eliminate discrimination? Is it not possible that the very *existence* of formal equality serves to reinforce the belief that discrimination does not happen *because the law prevents it*? This question lies beyond the boundaries of the work that Eyer summarizes and interprets, but it is certainly worth pausing and considering.

Interestingly, the idea that formal equality collaborates in the concealment of actual inequality is hardly a new idea, although the empirical proof of it may be more recently arrived. Nearly thirty years ago, Kimberlé Crenshaw warned us that in the context of anti-discrimination law:

Society's adoption of the ambivalent rhetoric of equal opportunity law has made it that much more difficult for Black people to name their reality. There is not longer a perpetrator, a clearly identifiable discriminator. Company X can be an equal opportunity employer even though Company X has no Blacks or any other minorities in its employ. Practically speaking, all companies can now be equal opportunity employers by proclamation alone. Society has embraced the rhetoric of equal opportunity without fulfilling its promise; creating a break with the past has formed the basis for the neoconservative claim that present inequities cannot be the result of discriminatory practices because this society no longer discriminates against Blacks.¹¹⁶

Michael Seidman later used the example of school desegregation to add:

Contradictions in the ideology of the separate-but-equal doctrine were permanently destabilizing and threatened any equilibrium.

By purporting to resolve those contradictions, *Brown* also served to end their destabilizing potential. The Court resolved the contradictions by definitional fiat: separate facilities were now simply proclaimed to be inherently unequal. But the flip side of this aphorism was that once white society was willing to make facilities legally nonseparate, the demand for equality had been satisfied and blacks no longer had just cause for complaint. The mere existence of *Brown* thus served to satisfy the demands of liberal individualism and, therefore, to legitimate current arrangements. True, many

116. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1347 (1988).

blacks remained poor and disempowered. But their status was now no longer a result of the denial of equality. Instead, it marked a personal failure to take advantage of one's definitionally equal status.¹¹⁷

What does all of this mean for the LGBT rights movement? Let us begin by assuming that what these and other critical race scholars intuited is true—that the existence of formal equality may make it far more difficult for minorities to make the case, on a macro level, that discrimination is real. Let us further assume that the social psychology cited by Eyer—the psychology that may explain employment plaintiffs' litigation losses—offers tangible evidence to support those claims, and does so on a more individualized, case-by-case basis. And finally, let us assume that some of the work of critical race theory is at least roughly translatable to the project of LGBT rights. We may then use those assumptions to develop a rather bleak hypothesis for the future of LGBT people and their treatment under the law, and we may guess that for them, as formal equality is achieved, some unintended and self-defeating consequences may result.

First, discrimination against LGBT people must, by necessity, take more subtle, difficult-to-prove forms as formally unequal schemes disappear. But then, the very fact of emerging formal equality may reinforce meritocratic beliefs to the degree that actual discrimination (already rendered less overt by would-be discriminators shifting their tactics to keep from running obviously afoul of anti-discrimination laws), simply becomes invisible.

If this effect were real, it would have serious implications for the future efficacy of the kind of LGBT-inclusive discrimination protections that the movement has fought for so vigorously. Those laws would undoubtedly create a powerful disincentive against overt forms of discrimination. However, the statistics cited in Eyer's work, and the prescient intuitions of critical scholars, suggest that where discrimination does occur despite the existence of new protections, the form of the discrimination might be subtle, and the remedial function of those laws might be quite minimal.

In fact, the potential for disbelief in anti-LGBT discrimination might ultimately be significantly compounded by the new reality of nationwide marriage equality. The rhetoric around marriage has focused consistently on the power of law to shape social reality. It has repeatedly stressed that there is a transcendent aspect of the word "marriage" that carries with it incredibly weighty social significance that goes beyond access to the rights it conveys; LGBT activists have essentially argued that marriage confers a kind of social respectability that other statuses, irrespective of the legal rights they provide, cannot do.¹¹⁸ Much of that rhetoric was adopted by judicial opinions rejecting

117. Louis Michael Seidman, *Brown and Miranda*, 80 CAL. L. REV. 673, 717 (1992).

118. See, e.g., *4 Ways Illinois Civil Unions Are Not Equal*, LAMBDA LEGAL (July 31, 2012), <http://www.lambdalegal.org/blog/4-ways-il-civil-unions-are-not-equal> ("Only the word *married* conveys the universally understood meaning applicable to the lifetime commitment many couples make. Regardless of whether civil union and marriage offer the

civil union or domestic partnership statuses as alternatives to marriage.¹¹⁹ And of course, much more of it made its way into Justice Kennedy's opinions in both *Obergefell* and *Windsor*.¹²⁰ Thus, the courts have reinforced the message that legal statuses can have the effect of creating or altering social statuses.

Assuming that Eyer is correct, what will the availability of marriage now mean to an American public who so closely guard the belief that the system is fundamentally fair? Now that we have gotten the very thing we tell them conveys a "universally understood meaning,"¹²¹ is it not possible that they will, in fact, believe what we have told them? Is it not possible that its very existence will reinforce the belief that the playing field has been leveled for LGBT Americans, and that consequently, other forms of anti-LGBT discrimination will become far less legible?

Many scholars and activists have warned us about the political "backlash" that sometimes follows a formal equality gain.¹²² Backlash is a potentially serious problem, but it is different than the one I describe. A "backlash" results

same . . . benefits and obligations on paper, when government relegates same-sex couples to civil unions rather than marriage, it forces them to explain the difference at work, at school, in hospitals and elsewhere. Couples in civil unions and their children lose the respect and dignity that they deserve, and often are denied vital services because many people don't understand what a civil union is." (emphasis in original)).

119. See, e.g., *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 418 (Conn. 2008) ("Although marriage and civil unions do embody the same legal rights under our law, they are by no means 'equal.' As we have explained, the former is an institution of transcendent historical, cultural and social significance, whereas the latter most surely is not."); *Opinions of the Justices to the Senate*, 802 N.E.2d 565, 570 (Mass. 2004) (finding that civil union status is an insufficient remedy for state's marriage exclusion, and asserting that "[t]he bill would have the effect of maintaining and fostering a stigma of exclusion that the Constitution prohibits. It would deny to same-sex 'spouses' only a status that is specially recognized in society and has significant social and other advantages").

120. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593-94 (2015) ("From their beginning to their most recent page, the annals of human history reveal the transcendent importance of marriage. The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life. Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm."); *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) ("By this dynamic DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects . . . and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.").

121. *4 Ways Illinois Civil Unions Are Not Equal*, LAMBDA LEGAL (July 31, 2012), <http://www.lambdalegal.org/blog/4-ways-il-civil-unions-are-not-equal>.

122. For an extraordinarily thorough discussion of backlash, see generally Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235 (2010).

when an action provokes a reaction that is consciously in opposition to the action; one of its definitions is a “strong public reaction against something,” and another is a “strong adverse reaction (as to a recent political or social development).”¹²³ What I describe is, instead, more analogous to a boomerang, the secondary definition of which is “an act or utterance that backfires on its originator.”¹²⁴

So we must ask—does the movement as currently constituted possess a weapon in its arsenal that will allow LGBT discrimination litigants to succeed even in the face of a possible boomerang effect? The movement is certainly not lacking for lawyers, but are impact litigators the right kind of lawyers? Do they have the specialization necessary to competently weed out losing claims and, for the strong claims, create thorough and persuasive factual records from the agency filing stage forward? Some may, but many likely do not. And there are certainly not a sufficient number of them to take up this work on any kind of large scale.

But maybe this isn’t a problem. Discrimination—particularly in the employment context—is a common area of attorney specialization, and cases are usually taken on a contingent-fee basis, so why should LGBT people worry? I argue that there is a great deal to worry about, specifically in the context of employment discrimination claims.

Because these cases are taken on a contingent-fee basis, private plaintiff-side employment attorneys prioritize cases with the greatest potential for payout. And unlike, for example, contingent-fee personal injury work, the value of an employment discrimination case is directly tied to the socioeconomic status of the plaintiff. The higher the employee’s pay, the higher some categories of potential damage amount.¹²⁵ This fact creates great incentive for plaintiffs’ attorneys to triage cases in such a way that wealthier individuals are served, and middle-class and working-poor are not.¹²⁶

123. *Backlash*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/backlash> (last visited Mar. 4, 2016).

124. *Boomerang*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/boomerang> (last visited Mar. 4, 2016).

125. See Philip L. Bartlett II, *Disparate Treatment: How Income Can Affect the Level of Employer Compliance with Employment Statutes*, 5 N.Y.U. J. LEGIS. & PUB. POL’Y 419, 435 (2002) (“Plaintiffs suing under Title VII can seek both compensatory and, in some cases, punitive damages. To the extent that compensatory damages are based on back pay, one would expect employees with higher incomes to obtain a larger remedy. Other forms of compensatory damages, such as medical bills or pain and suffering, would not be expected to vary with the income of an employee as systematically as the back pay award.”).

126. Philip Bartlett explains this incentives problem in greater detail:

Such high costs make it difficult, if not impossible, for low-income employees to hire a lawyer and bring a claim. One might counter that an employee need not pay these costs up front because attorneys will take cases on a contingency-fee basis. The problem for low-income employees, however, is that their potential recovery may not be large enough for a plaintiffs’ lawyer to find it worthwhile to bring a claim. Title VII does provide for an award of attorney fees if a plaintiff wins at trial. There is, however, no award of fees in unsuccessful cases or settlements, and the amount of attorney fees awarded is not adjusted to reflect the

In sum, formal equality gains in the anti-discrimination context will bring new opportunities to exercise rights, but also significant roadblocks to actually litigating these cases successfully. The current structure of the LGBT rights movement, pitched heavily toward the production of formal equality gains, cannot account for this reality.

IV. THE SHIFT TO NEXT-PHASE ADVOCACY

So what does it all mean? I suggest that the LGBT rights movement must adjust its strategy to account for the reality that formal equality gains, in addition to not being self-executing, may actually generate difficulty in proving the existence of unfair treatment even where such treatment exists. As demonstrated above, our current focus on impact litigation and policy reform cannot effectively address these next-phase problems. New tools are needed.

I suggest that such a strategic shift ought to entail a broadening of focus to encompass a far more comprehensive direct legal services program. In a prior article, I have discussed the potential for direct service organizations to create more democratic ways of prioritizing substantive legal issues within the LGBT rights movement.¹²⁷ Here, I argue that in addition to serving that purpose, direct legal service organizations are best situated to take on the next-phase work of enforcing equality gains. My reasons follow.

First, in contrast to legislative reform or impact litigation organizations, direct service organizations are designed to provide trial-level legal representation in areas of identified need.¹²⁸ And they are usually tasked by their funders with providing as many people as possible with those legal services. Direct service providers must usually provide extensive outcomes reporting to their funders; often that reporting involves detailed accounting of how many clients have been served.¹²⁹ Thus, direct service providers are best

risk of loss assumed by the lawyer. Title VII's provision for awarding attorney fees, moreover, does nothing to help an attorney finance the cost of litigation *ex ante*. If a plaintiff does not have the money to fund the effort herself, she may thus be unable to secure a lawyer to pursue even a strong claim of sexual harassment against her employer. Recent studies support the notion that low-income employees do not bring claims to the legal systems because of the high costs associated with doing so. In Hawaii, for example, "[t]he number one reason cited by low-income families for not getting legal help with their most serious problem, was that they thought a lawyer would be too expensive." The ABA study similarly found that the high cost of seeking legal assistance was a predominant reason for low-income households not doing so.

Id. at 445-47 (alterations in original) (citations omitted).

127. See Carpenter, *supra* note 49, at 108.

128. "Direct legal services, by definition, require one-on-one interactions with disadvantaged clients in crisis, advocacy in slow-moving and indifferent bureaucracies like public assistance offices, and overextended state courts." Barbara Graves-Poller, *Is Pro Bono Practice in Legal "Backwaters" Beyond the Scope of the Model Rules?*, 13 U. N.H. L. REV. 1, 62 (2015).

129. For example, a major funder of public interest activity in Pennsylvania is the Pennsylvania Interest on Lawyers Trust Account (PA-IOLTA) Board, which annually

able to handle the large volume of LGBT clients who will need help exercising their newly won marriage rights. And direct service providers, with their focus on trial work, would be better situated to handle anti-discrimination cases.

In addition, while impact litigators usually operate from a centralized national or regional office and litigate in multiple jurisdictions, direct legal service providers operate using a jurisdictionally specific platform, taking cases within a single state or even a single county. While this reality can create uneven distribution of legal services,¹³⁰ it also creates lawyers who are repeat players in a particular jurisdiction, and often in a particular court. Jurisdictionally specific specialization allows direct service attorneys to become highly knowledgeable about the court system in which they operate. Consequently, a direct service lawyer, unlike an impact litigator, might be well-suited to rights enforcement problems like Diane's, which required bureaucratic navigation, rather than actual litigation.

Parchomovsky and Stein addressed the role of direct services in correcting litigation asymmetry. They noted that, although it might prove politically difficult to implement on a large scale, the wider availability of free legal services generally would serve as a means to ameliorate litigation asymmetry and thus create greater and more meaningful access to already-announced rights.¹³¹

One might wonder whether my suggestion to increase access to direct service lawyers can be satisfied by a robust LGBT-specific pro bono program. I am skeptical of this proposal. If we assume that our next-phase legal work will largely center on family law and discrimination (unstable areas due to the newness of LGBT rights gains in those areas), pro bono is often poorly suited for those areas of law.

Custody cases in particular are notoriously difficult to match with pro bono partners, since they are virtually never final, and may last eighteen to twenty-one years, depending upon the jurisdiction.¹³² It is also a well-understood

disseminates several million dollars in funds. PA-IOLTA's annual report reflects how thoroughly it tracks statistics on clients served and outcomes. *See* PA. INTEREST ON LAWYERS TR. ACCOUNT BD., SUPREME COURT OF PA., FUNDING THE PROMISE OF JUSTICE FOR ALL: PENNSYLVANIA IOLTA ANNUAL REPORT 2015 (2015), <https://www.paiolta.org/wp-content/uploads/2016/02/Pennsylvania-IOLTA-Annual-Report-FY14-15.pdf>.

130. *See* SANDEFUR & SMYTH, *supra* note 104, at 11.

131. Parchomovsky & Stein, *supra* note 91, at 1366-67.

132. *See* Deborah M. Weissman, *Gender-Based Violence As Judicial Anomaly: Between "The Truly National and the Truly Local"*, 42 B.C. L. REV. 1081, 1130 (2001) ("Pro bono attorneys are often reluctant to handle domestic violence, or any family law, matters. They too are affected by the low status assigned to these claims. When they do agree to handle domestic violence cases as part of their pro bono responsibilities, they are often lured by assurances that cases will be disposed of quickly, and that any related custody, visitation, or child support matters will be handled in separate proceedings."); Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well by Doing Better*, 78 FORDHAM L. REV. 2357, 2393 (2010) (describing an interview with pro bono counsel, noting that "[a]nother counsel indicated that her firm was reluctant to take on family law matters because they

problem among the public interest bar that it is exceedingly difficult to locate pro bono counsel for low-income employment discrimination cases. In particular, large firms are notoriously resistant to taking on these cases, citing so-called “positional conflicts” with their corporate clients.¹³³

Instead of a pro bono effort, I suggest that the LGBT rights movement consider a partial shift of resources away from impact litigation and policy reform work, and toward the establishment of a robust direct legal services program. This proposal could be accomplished in at least three ways.

First, movement lawyers could work to establish more stand-alone statewide organizations that would provide legal services to as many LGBT litigants as possible within that jurisdiction.¹³⁴ The benefit of this model is autonomy, as an organization with its own Board of Directors, staffed exclusively by LGBT movement lawyers, can make determinations about case selection and resource allocation with a singular focus on provision of legal aid to the community. A drawback to such a model is that it is resource-intensive and potentially inefficient, requiring a complete infrastructure to be built for the purpose of providing legal services to a single community.¹³⁵

Second, movement lawyers could create multidisciplinary practices,

‘never end.’ Given associate turnover, there is a ‘serious risk that unless we control things tightly and narrow the scope [of representation],’ family law cases would ‘fall[] through the cracks.’”).

133. Cummings & Rhode, *supra* note 132, at 2393 (discussing the authors’ survey results: “[w]ithin our sample, the greatest area of conflict involves employment and labor cases, which nearly half of the firms indicated that they could not accept. Large firms are reluctant to represent plaintiffs with employment and labor claims because they either defend employers in such matters or they do not want to help establish precedents that their clients might regard as unwelcome. When asked about the most significant challenge facing his pro bono program, one counsel identified ‘business conflicts. It’s not a big problem, but in the range of problems we encounter, it’s the biggest. There are certain kinds of cases we just don’t do—labor and employment mainly’”); *see also* Norman W. Spaulding, *The Prophet and the Bureaucrat: Positional Conflicts in Service Pro Bono Publico*, 50 STAN. L. REV. 1395, 1418 (1998) (interviewing a director of a rural legal services organization, who stated that “positional conflicts dramatically impact the subject matters we are able to distribute to lawyers for pro bono work. I won’t even try to sell cases to particular firms. For example, the employment bar is very split between large firms who represent employers and small firms or solo practitioners who represent employees. The larger firms simply won’t take employee cases so I don’t even try to pitch them.”).

134. The organization that I worked for, Equality Advocates Pennsylvania, was such an organization. It focused on the provision of legal services, as well as policy reform and education on legal and policy issues, specifically and exclusively in Pennsylvania. FreeState Justice is a contemporary example of such an organization. *See* FREESTATE JUSTICE, <https://freestate-justice.org/> (last visited May 29, 2017).

135. The resource-intensive nature of such an endeavor, combined with difficulty in locating funding for such projects, has often resulted in financial instability for stand-alone legal service providers. For example, after I left Equality Advocates, the economic downturn of 2008 resulted in the organization transferring its entire legal department to Mazzoni Center, a much larger and better-funded LGBT health and wellness service provider. *See* Jen Colletta, *Legal Group Moves to Mazzoni Center*, PHILA. GAY NEWS (Oct. 22, 2009), <http://www.epgn.com/news/local/1583-4098443-legal-group-moves-to-mazzoni-center>.

working to embed more direct service legal departments into existing LGBT services organizations that provide healthcare and other community services.¹³⁶ This model offers a few different benefits. First, it is likely more efficient and less cost-intensive to hire a legal department to work on LGBT issues in an existing agency than it is to create a standalone legal service provider. Second, this model would situate lawyers in organizations where low-income people are already likely to come for other wellness-related services. Generally referred to as “multidisciplinary practice,” where this model situates legal service provision in a healthcare setting it is known specifically in legal services parlance as a “medical-legal partnership.”¹³⁷ Such models can holistically serve the needs of HIV-affected and transgender patients, as well as same-sex couples seeking access to assisted reproductive technology.¹³⁸

There are, however, three drawbacks of this model. The first is that such an organization is likely to be managed by nonlawyers. Such an organizational structure, while not inherently objectionable, might create ethical tensions for the lawyer supervisee, depending upon the quality of the relationship between the lawyer and nonlawyer, and the closeness of the supervision of the lawyer by the nonlawyer.¹³⁹ The second is that exclusive focus on the intersection of medical and legal needs might ignore other issues that, while critical to the enforcement of hard-won rights, might have no easily identifiable nexus with health outcomes. The third drawback is that such a model is dependent upon the existence of some other, larger LGBT-focused service provider—a reality that simply does not exist in much of the nation.

Last, movement lawyers could work with established legal aid organizations to develop legally and culturally competent LGBT-specific

136. A few such legal departments already exist, such as Philadelphia’s Mazzoni Center and Washington D.C.’s Whitman-Walker Health. See *Legal Services*, MAZZONI CTR., <https://www.mazzonicenter.org/legal-services> (last visited June 1, 2017); *Law & Policy*, WHITMAN-WALKER HEALTH, <https://www.whitman-walker.org/legal> (last visited June 1, 2017).

137. See Mallory Curran, *Preventive Law: Interdisciplinary Lessons from Medical-Legal Partnership*, 38 N.Y.U. REV. L. & SOC. CHANGE 595 (2014) (describing the purpose of a medical-legal partnership as “bring[ing] together the medical and legal professions to address the needs of vulnerable patients and communities by identifying, solving, and preventing health-harming legal needs”).

138. Although not a medical-legal partnership, New York’s Anti-Violence Project is similar, in that it situates a legal service department within an organization tasked with providing a variety of both legal and non-legal services to LGBT victims of “all forms of violence, including hate violence, intimate partner violence, sexual violence, pick-up violence, and institutional violence in all five boroughs of New York City.” *Get Support*, ANTI-VIOLENCE PROJECT, <http://www.avp.org/get-help/get-support> (last visited May 29, 2017).

139. The ABA’s Model Rules of Professional Conduct actually forbid such an arrangement in the for-profit context: “A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if . . . a nonlawyer has the right to direct or control the professional judgment of a lawyer.” MODEL RULES OF PROF’L CONDUCT r. 5.4(d) (AM. BAR ASS’N 2008).

departments.¹⁴⁰ Such a project features a number of benefits. First, an LGBT department of an existing legal aid provider would be able to take advantage of already existing infrastructure. Second, LGBT-focused attorneys at such an organization would be surrounded by a community of lawyers who would be able to provide them with vital training and support. Third, those lawyers might be better able to spread their expertise in LGBT issues to other attorneys, acting as an on-site resource to attorneys in those departments handling cases that somehow intersect with LGBT-rights enforcement issues. Fourth, existing legal aid organizations exist across the nation, even in areas with few supports for LGBT people specifically. And last, such an arrangement might be better able to recognize and address intersectional oppression, since clients would be able to obtain legal services that were linked, unlinked, and partially linked to LGBT status. One drawback to such a model might be that a legal aid provider might not maintain a sustained focus on LGBT issues, and could conceivably sacrifice such a program in the face of funding constraints.

I am not wedded to any of the above models of direct service provision. As noted, each has its strengths and potential pitfalls. However, I am wedded to the notion that the recent gains made in LGBT formal equality will not reach their potential to transform the lives of ordinary citizens without significant reorganization within the movement. And that reorganization, I contend, must directly address the issues I have enumerated here. It must better position the movement to help individual clients enforce their rights, and it must not turn a blind eye to the significant uphill climb that litigants will face in convincing the public that anti-LGBT discrimination exists, even in the face of formal equality gains.

V. CONCLUSION

My suggestion by no means presupposes that the work of impact litigation and policy reform is, or ought to be, over. An examination of the dockets of LGBT impact litigators or policy reform groups clearly demonstrates the continued need for high-level appellate litigation to eradicate formal inequality where it persists.¹⁴¹ And the need for policy reform efforts remains clear, as states attempt to block the passage of LGBT-inclusive anti-discrimination protections, and carve deep religious exemptions into existing (and even

140. Several such departments already exist. For example, California Rural Legal Assistance has an LGBT program, as does Legal Services NYC. See *LGBT Program*, CAL. RURAL LEGAL ASSISTANCE, <http://www.crla.org/lgbt-program> (last visited May 29, 2017); *LGBTQ Advocacy*, LEGAL SERVS. NYC, <http://www.legalservicesnyc.org/what-we-do/practice-areas-and-projects/lgbtq-advocacy> (last visited May 29, 2017).

141. For example, the Supreme Court's recent *per curiam* decision requiring Alabama to give full faith and credit to out-of-state adoptions performed on behalf of LGBT parents, voiding a proclamation by the Alabama Supreme Court that such adoptions were "void" in the state. See *V.L. v. E.L.*, 136 S.Ct. 1017, 1022 (2016).

prospective) laws.¹⁴² For the struggles that have yet to reach the next phase, our policy reform workers remain as critical as ever.

In addition, impact litigators and direct service providers often work well together on the same cases. Impact litigators generally have deep experience with appellate work, which many direct service providers engage in on a much more limited basis. Thus, direct service providers can work alongside impact litigators on appellate litigation that has the potential to create policy reform.

However, we cannot deny that something important has changed. We are moving out of a world in which many of us have spent our entire careers—a world in which the utter lack of formal equality for LGBT people has infused nearly every interaction our clients have had with the law. We should be glad to go, but we may well be daunted by the complex reality that has arrived.

In this next-phase reality, thousands of same-sex couples are raising children in rural areas that may well be completely hostile to them, and must somehow be able to access marriage—with the equal parentage rights, equitable and fair divorce, and thousands of other rights that ought to flow from that status. When those people try to access their newly-won rights—when they apply for jobs, or when they apply for marriage licenses, or when they try to put both parent’s names on a birth certificate—they will not find an easy road. When employment discrimination protection is achieved nationally, those same LGBT people will be fired from hostile places of employment when they attempt to place their partners on their health insurance. They will encounter skeptical fact finders and hostile juries. The large-scale policy reform efforts and the carefully executed impact litigation projects that have become the hallmarks of the movement will have become atomized, broken down into thousands of smaller, knottier, more fact-bound problems.

I fear that without a quick pivot to addressing the issues I have raised here, the LGBT rights movement may soon find itself in dire straits. Lacking a coherent message about what the next phase holds, LGBT organizations may experience a precipitous drop in financial support for the movement, as funders begin to believe that the achievement of the movement’s marquee formal equality gains mean that there is no work left to do. And in turn, movement leaders may be forced to wind down organizations, which will compound the belief that the mission of LGBT equality has been accomplished and further weaken the movement.

Signs already point in this direction. For example, in 2013, the LGBT military advocacy group OutServe-SLDN unexpectedly folded. An investigative report by The Advocate suggested that, although internal strife contributed to the organization’s failure, “[m]embers and observers

142. See David S. Cohen & Leonore Carpenter, *Anti-Gay Bias Legal in Indiana Before New Law: Column*, USA TODAY (Mar. 31, 2015, 5:19 PM), <http://www.usatoday.com/story/opinion/2015/03/31/indiana-religious-freedom-restoration-act-discrimination-anti-gay-column/70723684>.

acknowledged that OutServe-SLDN faced a serious financial crisis, as external donations dropped precipitously after the 2011 repeal of “don’t ask, don’t tell.”¹⁴³ And again, in December of 2015, Empire State Pride Agenda (an LGBT policy reform organization that had operated in New York State for 25 years) announced with little warning that it was closing its doors, “citing the fulfillment of a 25-year campaign for equality.”¹⁴⁴ This messaging was quite questionable, in light of the fact that Empire State Pride had actually not achieved one of its most elusive and critical formal equality goals—passage of a transgender-inclusive state nondiscrimination law in New York.¹⁴⁵ Nonprofits are usually reticent to admit publicly that their finances have gone into a death spiral, but here, as with OutServe-SLDN, it is highly likely that financial woes played a part in ESPA’s sudden determination that its work was done.¹⁴⁶

We can do better. With foresight and discipline, the movement can transition toward a new structure, and it can do so without imploding or leaving its most vulnerable members behind. There’s a bridge to build between law on the books and law in action.

143. Sunnivic Brydum, *What Really Happened When OutServe-SLDN Came Undone*, ADVOCATE (July 30, 2013), <http://www.advocate.com/politics/military/2013/07/30/what-really-happened-when-outserve-sldn-came-undone>.

144. Jesse McKinley, *Empire State Pride Agenda to Disband, Citing Fulfillment of its Mission*, N.Y. TIMES (Dec. 12, 2015), https://www.nytimes.com/2015/12/13/nyregion/empire-state-pride-agenda-to-disband-citing-fulfillment-of-its-mission.html?_r=0.

145. Instead, the organization contented itself with an executive order from Governor Cuomo barring antitransgender discrimination in the state; this action, while laudable, is not nearly as stable and permanent as legislative action, since it can be rescinded by the next governor. See N.Y. COMP. CODES R. & REGS. tit. 9, § 466.13 (2016).

146. According to at least one source, donations to the organization “dried up” once New York had achieved marriage equality. See Pauline Park, *In N.Y., a Mission Unfulfilled*, WASH. BLADE (Jan. 7, 2016, 11:14 AM), <http://www.washingtonblade.com/2016/01/07/in-n-y-a-mission-unfulfilled>.